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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 282

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY,
Petitioners,

vs.

J. H. WIGGINS.

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway, petitioners, present this petition for writ of certiorari to review a decision of the Circuit Court of Appeals, for the Fifth Circuit, and show unto this Honorable Court:

A.

Summary Statement of the Matter Involved.

Plaintiff was section foreman of the defendants, who, as Receivers, operated the Seaboard Air Line Railway properties at the time of the happening of the incident as the

basis of the suit, and brought the action as an employee under the Federal Employers' Liability Act.

The scene of the accident was near Oviedo, Florida, in Seminole County, on the 15th of February, 1938. Plaintiff claims he was injured by the motor car furnished him by defendants in his employment running into an open switch as he was proceeding to his work for the defendants.

The material points in plaintiff's claim are:

(A) Alleged negligence of defendants through their employees in leaving a switch open on defendants' railroad.

(B) Negligently allowing said switch to remain open.

(C) Injury of the plaintiff by defendants' negligently operating a motor car furnished by defendants for plaintiff in his employment, by negligently failing to have said motor car under proper control so as to avoid running into said open switch.

(D) The derailing of said motor car and injuring plaintiff by and through the servants and employees of defendants other than plaintiff in the course of their employment, in that the defendants negligently ran and operated the motor car by negligently failing to see the target indicating said switch was open in time to avoid running into said switch.

Jurisdictional matters and interstate commerce character of the railroad was not in question.

Plaintiff claimed total and permanent injuries (R. 14).

Defenses.

1. Defendants denied that plaintiff was riding on the motor car in the course of his employment and stated that he was section foreman of defendants and it was his duty to operate the motor car himself and it was not in the

course of his employment to ride on same when operated by some other person.

2. That the person operating the motor car was not then and there in the employ of the defendants acting in the course of his employment in the operation of the said motor car, and alleged that the rules of defendants provided that no person in the employ of the defendants was authorized to operate said motor car save and except the plaintiff himself, he being the section foreman and in charge of the motor car and the crew.

3. Denial that the defendants negligently left the switch open.

4. Denied that they negligently allowed the switch to remain open.

5. Denied that plaintiff was injured on account of or because of any negligence of defendants, and denies that he suffered injuries as alleged.

6. That at the time of the injury alleged in the accident on the 15th of February, 1938, that plaintiff was section foreman in the employment of the defendants and that he was governed by the following rules:

I. *Safety Rules.*

XII-3. The foreman or other employee to whom the car is assigned is responsible for the inspection, use, operation and care of the car. The foreman will personally operate the car, unless he has on the force a man better fitted to do so, but in no case is the foreman relieved of responsibilities for inspection, use, operation, and care.

XII-22. Motor cars will be run at a safe speed at all times and must not exceed those speeds provided by Rule 759.

XII-28. When operating cars thru towns and villages or when approaching highway crossings at grade, the car will be brought under complete control and no attempt will be made to cross any street or road until it is known to be safe. If necessary the foreman will stop the car and wait until there is no danger before crossing.

II. *Operating Rules.*

1160. Section Foreman must know that anything that interferes with the movement of trains at maximum speed is considered an obstruction and must be protected accordingly.

When track is obstructed or unsafe for passage of trains at maximum speed it must be protected a sufficient distance on each side by flagman with signals as prescribed in Rule 99.

1169. They will not permit any person to run any motor car, lever car, or velocipede over their section unless such person holds written permit from the General or Division Superintendent, Division Engineer or Road Master.

1170. Section Foreman should pass over their sections daily, if possible, and in any event as often as once every other day to inspect the condition of the road bed, main track, sidings, bridges, culverts, fences, road crossings, watercourses, telegraph and telephone lines, frogs and switches, and to see that they are in proper condition; and, if repairs are needed, have them attended to at once.

Careful watch should be kept for broken rails, loose bolts or nuts in joints, frogs and crossings. Water barrels at stations and on bridges and trestles should be kept filled and when out of repair and can not be repaired, report to Road Master.

1172. They must personally supervise the work and see that workmen faithfully perform their duties, and suspend

any subordinate for neglect or misconduct, reporting the same to the Road Master.

and that plaintiff violated these rules, stating that he had been employed by the defendants and Seaboard Air Line Railway Company for approximately thirty years, and that the rules were of long standing and were for his guidance in the management and operation of the motor car and he violated and refused to obey them and each of them.

7. That the plaintiff violated all of the rules aforesaid set out in the preceding paragraph and that such violation was the proximate cause of his injury.

8. Contributory negligence on the part of plaintiff in the violation of the rules aforesaid.

9. That defendant violated the following rule:

> "1169. They will not permit any person to run any motor car, lever car, or velocipede over their section unless such person holds written permit from the General or Division Superintendent, Division Engineer or Road Master."

in that he allowed someone else to operate the motor car in violation of the rule and therefore assumed the risk of the operation of the motor car by the individual operating same.

10. Pleads the violation of the following rule:

> "1170. Section Foreman should pass over their sections daily, if possible, and in any event as often as once every other day to inspect the condition of the road bed, main track, sidings, bridges, culverts, fences, road crossings, watercourses, telegraph and telephone lines, frogs and switches, and to see that they are in proper condition; and if repairs are needed, have them attended to at once.

> "Careful watch should be kept for broken rails, loose bolts or nuts in joints, frogs and crossings. Water barrels at stations and on bridges and trestles should be kept filled and when out of repair and can not be repaired, report to Road Master."

and says that it was plaintiff's duty to keep a lookout for the various switches into which the motor car ran and that he could have seen it if he had been looking and attending to his business and that his failure to do so, was the proximate cause of his injury.

These defenses were pleaded to all of the complaint except paragraphs six and seven, which as we have seen, charge the defendants as above set out:

(a) negligently operating the motor car by negligently failing to have said motor car under proper control so as to avoid running into said open switch.

(b) Said motor car was then and there caused to be derailed by the negligence of the defendants by and through their servants and employees other than plaintiff, in the course of their employment, in that defendants negligently ran and operated said motor car by negligently failing to see the target indicating said switch was open in sufficient time to avoid running into said open switch.

A motion was made as to paragraphs six and seven of the complaint, and being overruled, answer was filed as to six and seven which averred all the aforesaid defenses and again set up the violation of the same safety rules and set out that the plaintiff was in charge of the said motor car and if there were any negligence in the operation of same on the failure to see the target in time to stop, it was his negligence, and that his negligence was the proximate cause of his injury.

Summary of the Facts Admitted and Shown by the Testimony.

The accident happened on the 15th of February, 1938, about 8:30 to 9 o'clock in the morning. Plaintiff was Section Foreman of defendants as Receivers of the Seaboard Air Line Railway and had been such Section Foreman at different localities since June 28, 1907. The weather condition was such that the target of the switch could be seen for three hundred feet, and the plaintiff Wiggins said that he could have, if he had been looking, seen the switch that far; also for more than one hundred feet the actual condition of the rail could be seen as shown by photographs in the record, page 58, showing the switch open.

Plaintiff Wiggins was seated in front on the motor car and Earl Moore, one of the section hands, was sitting behind him operating the motor car, with the exception of keeping the lookout and was depending on Wiggins, the foreman, to take care of what was ahead. Apparently Moore and Wiggins saw the open switch about the same time, when the car was about four or five feet from the switch. Wiggins, from his interrogatories, said he didn't believe he could have stopped the motor car if he had been operating it, but stated: "I do not mean to state by this answer that had I been actually operating the car I would not have observed the danger at an earlier time". Earl Moore had no written permit to operate the car and the rules, even if Moore had had a permit, would not relieve the Section Foreman from the responsibility for the operation of the car, all of said rules being then currently in force.

The motor car had just passed a large celery washing plant and was approaching a crossing somewhat ahead, which was 87.6 feet from the switch to the center of the road crossing, which was not so badly obscured as appears by the photos shown in the record, pages 55-58 inclusive, and

the appearance of the place not having changed. There was no traffic on this road, nor the little used place by the track at the time of the accident.

Moore couldn't see ahead because Wiggins, the Foreman, was in front of him and Moore, in order to look ahead, had to look around or over Wiggins, and was depending on Wiggins.

At the trial it was conceded that the switch was left open by the employees of the defendants on the night of February 14, 1938.

At the conclusion of the testimony in the lower court on motion of defendants' counsel, the Court directed a verdict for the defendants and we deduce from the Court's statement as shown in the record, page 79, that it was on the ground that the plaintiff's negligence was the sole proximate cause of his injury based on the whole testimony before the Court.

An appeal to the Circuit Court of Appeals resulted in a reversal on the 23rd of May, 1941, and a copy of the opinion appears at page 91 of the Record.

Under date of June 12, 1941, order was entered in the Circuit Court of Appeals staying the Mandate pending the filing of this Petition in this court until August 1, 1941.

B.

Reasons Relied Upon for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Fifth Circuit in this cause has rendered a decision which is in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit: The Sixth Circuit in the case of:

Louisville & N. R. Co. v. *Davis*, 75 Fed. (2d) 849.

also in conflict with decision of the Second Circuit in the case of:

Unadilla Valley Ry. Co. v. *Dibble*, 31 Fed. (2d) 239.

It has decided a Federal case in a way probably in conflict with applicable decisions of this court, in that the decision of the Circuit Court of Appeals for the Fifth Circuit in the case at bar is in conflict with decisions of this court in the cases of:

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224;

Frese v. *Chicago B. & Q. R. Co.*, 263 U. S. 1; 68 L. Ed. 131.

Great Northern R. Co. v. *Wiles*, 240 U. S. 444; 60 L. Ed. 732.

Davis v. *Kennedy*, 266 U. S. 147; 69 L. Ed. 212, 45 Sup. Ct. Rep. 33.

The Circuit Court of Appeals for the Fifth Circuit in this case at bar decided an important question of law in conflict with a great weight of authority as hereinafter shown in the brief following.

C.

Precise Questions Involved.

1. UNDER THE CIRCUMSTANCES STATED, WAS NOT THE NEGLIGENCE OF THE PLAINTIFF IN FAILING IN HIS DUTY TO OBEY THE RULES OF THE DEFENDANTS AND KEEP A LOOKOUT FOR THE OPEN SWITCH SO AS TO AVOID RUNNING THE MOTOR CAR INTO IT THE SOLE PROXIMATE CAUSE OF HIS INJURIES OF WHICH HE COMPLAINS?

2. WHEN PLAINTIFF PERMITTED ONE OF THE SECTION HANDS UNDER HIM, IN VIOLATION OF THE RULES, TO OPERATE THE MOTOR

CAR AT THE TIME AND PLACE OF THE ACCIDENT, AND THE CONDITION OF THE SWITCH WAS PLAINLY OBSERVABLE AND PLAINTIFF PLACING HIMSELF IN FRONT OF THE ACTUAL OPERATOR SO THAT HE COULD NOT PROPERLY OPERATE THE MOTOR CAR, DID NOT THE PLAINTIFF THUS ASSUME THE RISK ATTENDANT THEREON?

D.

Prayer for Writ.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana, commanding that Court to certify and send to this Court on the day to be designated full and complete transcript of the record and all proceedings in the case entitled J. H. Wiggins, Appellant, versus Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway, Appellees, being Case No. 9757, to the end that this cause may be reviewed and determined by this court; that the decree of the Circuit Court of Appeals be reversed and that Petitioners be granted such other and further relief as may seem proper.

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